LIM KOK CHONG & ANOR A

v.

PP

HIGH COURT SABAH & SARAWAK, BINTULU B
JOHN KO WAI SENG JC
[CRIMINAL APPEAL NO: 42-01-2011 (BTU)]
19 MAY 2011

CRIMINAL PROCEDURE: *Forfeiture - Dangerous Drugs - Property seized under s. 25(1), Dangerous Drugs (Forfeiture of Property) Act 1988 ('FPA') - Truck forfeited to government following Sessions Court order - Appeal against - Whether Sessions Court correct in raising presumption under s. 35 of FPA against first appellant as liable person - Whether appellants raised reasonable doubt against forfeiture by admissible evidence - Whether appellants lawfully entitled to truck - Whether order of forfeiture under s. 32(3) of FPA to be set aside* C D

CRIMINAL PROCEDURE: *Forfeiture - Order of - Appeal against - Sessions Court ordered for truck to be forfeited to government - Whether Sessions Court correct in raising presumption under s. 35, Dangerous Drugs (Forfeiture of Property) Act 1988 ('FPA') against first appellant as liable person - Whether appellants raised reasonable doubt against forfeiture by admissible evidence - Whether appellants lawfully entitled to truck - Whether order of forfeiture under s. 32(3) of FPA to be set aside* E F

The first appellant was arrested during an investigation for an offence committed under s. 39B of the Dangerous Drugs Act 1952 ('the DDA') in connection with which the subject property, the first appellant's Toyota Hilux QSN 5595 ("truck"), was seized under s. 25(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the FPA'). No drugs were found on the first appellant nor inside the truck and he was not charged for any drug offences under the DDA. The truck was subject to the second appellant's ownership claim under a hire purchase agreement between the first and second appellants. The Sessions Court judge had ordered the truck to be forfeited to the government under s. 32(3) of the FPA. Dissatisfied, the appellant appealed. The appellants submitted that the Sessions Court judge had erroneously adopted the pre-*Hong Leong Bhd v. PP* approach by G H I

A allowing the presumption under s. 35 of the FPA instead of following the *Hong Leong* case which did not allow the presumption to be drawn.

Held (allowing the appellants' appeal):

B **(1)** It was necessary to construe s. 35 of the FPA as to whether its formulation and terminology allows it to be applied to all applications and proceedings under the FPA including a s. 32(2) reference without exception. If the *Hong Leong* case was followed, it would have an anomalous situation whereby C a presumption could not be drawn for seized property already in the lawful detention of the police by due process ready to be forfeited under s. 32(1) of the FPA, whereas for a proceeding which started from scratch under Part III of the FPA against property as illegal in a potentially liable person's D procession, the prosecution was allowed the advantage to draw a presumption under s. 35 of the FPA against the affected party. Logically, if a presumption was to be allowed, the preference should be accorded to the proceedings for the forfeiture of seized property with the police under s. 32(2) of E the FPA because it would have been seized in accordance with law following the spirit of s. 114(e) of the Evidence Act 1950 as when compared with proceedings under Part III of the FPA. The Sessions Court judge was correct to raise the presumption under s. 35 of the FPA against the first appellant F as a liable person (s. 7(1)(a)(ii) of the FPA) and that the truck was illegal property (s. 7(1)(a)(iii) of the FPA) for the appellants to raise evidence to show otherwise and if this was done it would still ultimately remain for the PP to rebut the same. (paras 9, 12 & 15)

G **(2)** In reference to s. 32(3) FPA, in order for the court to order the release of the truck the appellants had to show (since the evidential burden was now on them by virtue of s. 35 of the FPA) to raise a reasonable doubt against H forfeiture by admissible evidence that (a) the person claiming is lawfully entitled to the truck; (b) no offence under the FDA or under the DDA has been committed in respect of the truck; and (c) the truck is not illegal property; and the property will be ordered forfeited by the court if any of the I above conditions are not met (*Public Finance v. PP*). The facts showed that the appellants have satisfied the ownership claim and that no offence under the FPA or under the DDA had

been committed in respect of the truck. The first appellant had proven by admissible evidence, that the truck was purchased by legitimate income and was not property within the meaning of "illegal" property as defined in s. 2(2) of the FPA. (paras 16, 17 & 18)

(3) The appellants' appeal against the decision of the Sessions Court judge was allowed. The appellants were lawfully entitled to the truck and the order of forfeiture to the government under s. 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1998 was set aside. (para 24)

Case(s) referred to:
AmFinance Bhd lwn. PP [2010] 7 CLJ 607 HC ***(refd)***
Hong Leong Bhd v. PP [2009] 8 CLJ 463 HC ***(refd)***
Kanagasavey Sinayah v. PP [1995] 2 CLJ 598 HC ***(refd)***
PP lwn. Lee Kee Seng & Satu Lagi [2005] 3 CLJ 649 HC ***(refd)***
PP lwn. CIMB Bank Bhd [2010] 1 LNS 1020 HC ***(refd)***
PP v. Tan Lee Kok [1998] 2 CLJ 286 CA ***(refd)***
Public Finance Bhd v. PP [1999] 8 CLJ 485 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 2(2), 7(1)(a)(ii), (iii), 8, 9, 25(1), 31(2), 32(1), (2), (3), 35
Evidence Act 1950, s. 114(e), (f)

For the 1st appellant - Hii Chee Wong; M/s Hii & Co
For the 2nd appellant - Ma Seong Yun; M/s Kadir, Wong, Lin & Co
For the respondent - Hairun Najmi DPP

Reported by Suhainah Wahiduddin

JUDGMENT

John Ko Wai Seng JC:

[1] The 1st appellant was arrested on 7 November 2009 during an investigation for an offence committed under s. 39B of the Dangerous Drugs Act 1952 (the "DDA") in connection with which the subject property, the 1st appellant's Toyota Hilux QSN 5595 ('truck") was seized under s. 25(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 (the "FPA"). No drugs were found on the 1st appellant nor inside the truck and he was not charged in court for any drug offences under the DDA.

[2] The truck is subject to the 2nd appellant's ownership claim under a hire purchase agreement dated 13 September 2006 between the 1st and 2nd appellants.

[3] A reference was made by the Public Prosecutor ("PP") pursuant to s. 32(2) of the FPA in respect of the truck following receipt of the appellants' claim by the PP. The Sessions Court had on 10 December 2010 ordered the truck to be forfeited to the Government under s. 32(3) of the FPA.

[4] The appellants by their 1st and 2nd petition of appeal (consolidated) being dissatisfied with the decision of the learned Sessions Court judge appeal against it.

Presumption Under Section 32 FPA (Grounds B2 & B5 and 2.1 & 2.2 of Respective 1st and 2nd Petitions of Appeal (Page 3 of 1st Record of Appeal (1ROA) and 2nd Record Of Appeal (2ROA))

[5] Learned counsel for the appellants submitted that the learned Sessions Judge had wrongly adopted the pre-*Hong Leong Bhd v. PP* [2009] 8 CLJ 463 approach (following *Kanagasavey v. PP* [1995] 2 CLJ 598; *PP lwn. Lee Kee Seng & Satu Lagi* [2005] 3 CLJ 649 and *PP v. Tan Lee Kok* [1998] 2 CLJ 286) by allowing the presumption under s. 35 of the FPA to be drawn instead of following the *Hong Leong* case (*supra*) in not allowing the presumption to be drawn.

[6] Section 35 of the FPA reads as follows:

> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary be admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

[7] In the *Hong Leong* case *(supra)* had held that s. 35 of the FPA does not apply to a claim under s. 32(1) of the FPA, irrespective of whether one takes the literal or purposive approach to the interpretations of that provision. The learned judge Lim Yee Lan J in excluding the applicability of the s. 35 of the FPA presumption to a s. 32(1) reference had this to say (at paras. [26] and [27] *ibid*):

[26] Thus, while an inquiry under s. 32 is a proceeding under the act, it is however not a proceeding brought by the PP against any person on the ground that he is liable person or on the ground that the property is illegal property.

[27] Consequently, a proceeding under s. 32(3) is not a proceeding that is envisaged under s. 35 of the Act and hence the presumptions therein that the court shall presume a person to be a liable person and a property to be an illegal property does not apply to a proceeding under s. 32 of the Act. It is to be emphasised that the Court of Appeal in *Public Prosecutor v. Tan Lee Kok* did not touch at all on the relationship between ss. 32 and 35 of the Act, its focus being more on the difference in the procedures between ss. 8 and 32 proceeding under the Act.

[8] According to *Hong Leong* case (*supra*), this means that a reference to the Sessions Court made under s. 32(2) of the FPA even though it is a proceeding under the FPA but because it is not brought by the PP against a person as a liable person or on the ground that the property is illegal property, should not be construed as a proceeding under the FPA for the presumption under s. 35 of the FPA to be applicable.

[9] The recent High Court cases of *AmFinance Bhd lwn. PP* [2010] 7 CLJ 607 and *PP lwn. CIMB Bank Bhd* [2010] 1 LNS 1020 have declined to follow the *Hong Leong* case (*supra*). Before the court conclude whether the learned Sessions Judge is correct not to follow *Hong Leong* case (*supra*), it is necessary to construe s. 35 of the FPA as to whether its formulation and terminology allows it to be applied to all applications and proceedings under the FPA including a s. 32(2) of the FPA reference without exception.

[10] Under Part III of the FPA proceedings for forfeiture, the prosecution will be assisted in its task to forfeit illegal property by the s. 35 of the FPA presumption in having the evidential burden being placed against the affected party resisting the forfeiture of a seized or intended to be seized property under the FPA. Noting that this presumption is giving due recognition to the doctrine of *omnia praesumuntur rite esse acta* embodied in s. 114(e) of the Evidence Act 1950 that all acts are presumed to have been rightly and regularly done. The process of initiating a proceeding by the PP is provided under ss. 8 and 9 of the FPA which results in the affected person having to attend court to show cause against forfeiture of the properties identified as illegal.

[11] Reading s. 32(1) of the FPA and its proviso, the seized property with the police becomes forfeited after three months. If during this period there is a claim by the (affected) party, the PP initiates the proceedings by making the reference under s. 32(2) of the FPA to the Sessions Court. The (affected) party writes in to the PP, he does not make an application to the court at all. From this perspective the PP is instigating a proceeding similar to that under Part III of the FPA to maintain and ensure that the illegal or seized property should be forfeited (under proviso to s. 31(1) of the FPA) which would have been automatically forfeited if not for the claim made. This weakens the distinction that the *Hong Leong* case (*supra*) had attempted to draw from the manner the proceedings are instituted to exclude a reference under s. 31(2) of the FPA as not a proceeding within the contemplation of s. 35 of the FPA. In fact in both instances, the net effect is that the PP starts the proceedings to the court to acquire a decision or order over the right to forfeit the seized or illegal property from the (affected) party.

[12] If the *Hong Leong* case (*supra*) is followed, we will have an anomalous situation whereby a presumption cannot be drawn for seized property already in the lawful detention of the police by due process ready to be forfeited under s. 32(1) of the FPA, whereas for a proceeding which is starting from scratch under Part III of the FPA against property as illegal in a potentially liable person's possession, the prosecution is allowed the advantage to draw a presumption under s. 35 of the FPA against the affected party. Logically, if a presumption is to be allowed, the preference should be accorded to the proceedings for the forfeiture of seized property with the police under s. 32(2) of the FPA because it would have been seized in accordance with the law following the spirit of s. 114(e) of the Evidence Act 1950 as when compared with proceedings under Part III of the FPA.

[13] In addition under s. 2(2) of the FPA, the definition of "proceedings under this Act" means:

> any proceedings under any provision of this Act, including any prosecution for an offence under this Act;

would mean that the presumption in s. 35 of the FPA which is to apply to "any proceedings under this Act" is of general application applying to all proceedings under the FPA including the reference under s. 32(2) of the FPA as noted in the case of *PP v. CIMB Bank Bhd* [2010] 1 LNS 1020.

[14] What s. 35 of the FPA requires because of the context of the prior seizure and detention with a view to its forfeiture as contemplated by s. 32(1) proviso is to permit PP to raise a presumption that a claimant has the evidential burden because of the prior seizure to prove that person involved is not a liable person nor that the property is illegal property. If the claimant does raise such evidence then it is incumbent for the PP to rebut failing which the claimant will have proven his case against forfeiture under the FPA.

[15] The court finds that the learned Sessions Judge was correct to raise the presumption under s. 35 of the FPA against the 1st appellant as a liable person (s. 7(1)(a)(i) of the FPA) and that the truck is illegal property (s. 7(1)(a)(iii) of the FPA) for the appellants to raise evidence to show otherwise and if this is done it still ultimately remains for the PP to "rebut the same". Grounds B2 & B5 and 2.1 & 2.2 of the respective 1st and 2nd Petitions of Appeal are not made out.

No Proper Consideration and Evidence Admitted (Grounds B1, B3, B4 & B6 And 2.3, 2.4, 2.5, 2.6 and 2.7 Of Respective 1st and 2nd Petitions of Appeal)

[16] In a reference under s. 32(3) of the FPA, in order 1 for the court to order the release of the truck the appellants have to show (since the evidential burden is now on them by virtue of s. 35 of the FPA) to raise a reasonable doubt against forfeiture by admissible evidence (see *Public Finance Bhd v. PP* [1999] 8 CLJ 485; [1999] 4 MLJ 143 at p. 147G) that:

(a) The person claiming is lawfully entitled to the truck;

(b) No offence under the FDA or under the DDA has been committed in respect of the truck; and

(c) The truck is not illegal property;

and the property will be ordered forfeited by the court if any of the above conditions are not met.

(a) *Ownership Claim*

It is not disputed by the evidence of RW1, the investigating officer that the truck is registered in the name of the 1st appellant and that he had purchased the truck from financing through the hire purchase agreement 13 September 2006 with the 2nd appellant who has an ownership claim.

A The 1st appellant had made a down payment of RM9,881 for the truck. CW6 testified that the 2nd appellant had granted to the 1st appellant an advance of RM81,000 payable by 84 instalments of RM1,161 each under the hire purchase agreement. 46 instalments had been paid by the family
B members according to CW6.

The 2nd appellant claims that under the hire purchase arrangement with the 1st appellant, ownership of the truck remains with the 2nd appellant.

C The appellants have satisfied the ownership claim

(b) *Offence Under FDA and DDA Relating to The Truck*

Learned counsel for the appellants submit that the evidence
D adduced by RW1 admits in his examination in chief (at p. 41 2ROA) that:

> The car was seized as it was suspected to be obtained from drug selling activities.

E Later RW1 (at p. 43 2ROA) also agreed in cross examination that when the truck was seized by Insp Shahrul the 1st appellant was not involved in any drug activities and there was no drug found in the truck.

F RW1 further confirmed in cross examination (at p. 47 2ROA) that the 1st appellant had been arrested under DDA but not charged for any drug activities.

The appellants have satisfied that no offence under the FDA or under the DDA has been committed in respect of the
G truck.

(c) *Is the Truck Illegal Property*

Learned counsel for the appellants have submitted that PP has
H failed to discharge the burden to prove that the truck was illegal property.

In rebuttal of the presumption raised by s. 35 of the FPA, the appellants contend that the 1st appellant had given sufficient evidence to prove his income deriving from legitimate business,
I corroborated and supported by the evidence of CW2, CW3 and CW5. CW3 had continued to service the monthly

instalments to the 2nd appellant. All the evidence adduced was not subject to cross examination by the PP and as such it is not disputed.

The monthly instalment due to the 2nd appellant under the hire purchase agreement is RM1,161. Based on the evidence adduced by the 1st appellant, CW2, CW3 and CW5, there is a legal gross monthly income of:

(i) 50% from Xin Yi Yuan ('exh. P1') (p. 35 2ROA): few hundred ringgit noting partners drawing of RM30,000 and net profit of RM22,176 for 2009 (p. 99 2ROA).

(ii) Canteen Tatau (p. 31 2ROA): gross RM20,000 to RM30,000 all these add up to show the financial capability of the 1st appellant and his mother CW3 to service the monthly instalment of RM1,161 to the 2nd appellant.

[17] The court is satisfied that the 1st appellant had thus proven by admissible evidence that the truck was purchased by legitimate income and is not property within the meaning of "illegal" property" as defined in s. 2(2) of the FPA as follows:

> any property, whether within or outside Malaysia:
>
> (a) which is wholly or partly derived or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act.

[18] The court finds that the appellants having adduced admissible evidence to satisfy the presumption under s. 35 of the FPA, it then becomes incumbent following the requirement of s. 32(3) of the FPA for the PP to "rebut the same" beyond reasonable doubt.

[19] The prosecution had adduced three sets of documents in particular the income tax of the 1st appellant ('ID2') which was only admitted for identification purposes and not marked as an exhibit. This evidence alone is insufficient to counter the fact that the appellants have been able to show that the 1st appellant and CW3 have enough resources from legitimate activities to pay for the down payment and to service the monthly instalments due to the 2nd appellant. No return to Inland Revenue or no tax payable does not necessarily mean no income, but it is a starting point. The least the prosecution can do is to produce CW3's

A income tax return to show that it is insufficient, as she may also by being involved in the canteen have her own source of income distinct from that of her son, the 1st appellant.

[20] In order to succeed the PP must in rebuttal adduce cogent
B evidence to show that the 1st appellant was using funds "wholly or partly derived or obtained from or by means of any prohibited activity". There is no such evidence produced by the prosecution before the Sessions Court sufficient to rebut the 1st appellant's evidence. If the prosecution's case is that the truck was bought
C in 2009 by the 1st appellant and paid by cash in full then the likelihood of it being regarded as illegal property would be greater on the kind of admissible evidence adduced before the Sessions Court. The fact that instalment payments for the truck are still being paid by CW3 to the 2nd appellant weighs heavily against
D the truck from being found as an illegal property.

[21] The court will presume in such a case if there are really two sources of funds available, one legitimate and the other falling within the scope of "illegal property" as defined by s. 2(2) of the
E FPA, that if it can be shown that the legitimate income is sufficient at all times to fund the purchase of the subject property then it will not be illegal property unless the prosecution can bring actual evidence to show that some of the illegal source really went by purpose or inadvertently towards paying for the property as to
F make it illegal property to be forfeitable under the FPA. This presumption accords with the spirit of the presumption of innocence and s. 114(f) of the Evidence Act 1950 that the common course of business has been followed in particular cases, in that a party has no reason to knowingly take a course of action
G which will break the law to expose him to a penalty if he can and has the means to perform it without breaking the law.

[22] The 1st appellant has been able to show that he has legitimate income sufficient to pay for the down-payment and the monthly instalments to the 2nd appellant. The PP has failed to
H discharge the burden to prove that the truck was illegal property under s. 32(3) of the FPA.

[23] The court finds that the appellants have established grounds B3, B4 & B6 and 2.3, 2.4, 2.5, 2.6 and 2.7 of respective 1st and
I 2nd petitions of appeal and their appeal must be allowed.

Conclusion

[24] The appellants' appeal against the decision of the learned Sessions Judge is allowed. The appellants are lawfully entitled to the truck, Toyota Hilux bearing registration number QSN5595 and the order of forfeiture to the government under s. 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1998 is set aside. The truck shall be released to the appellants.